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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 297

ALEX CARL SMITH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

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To the United States Court of Appeals for the Fifth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on April 3, 1967.

OPINION BELOW.

The opinion of the Court of Appeals for the Fifth Circuit (R. 26) is unofficially reported at ... F. 2d ....

JURISDICTION.

The District Court rendered no opinion with its order.

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on April 3, 1967 (R. 26) (rehearing denied on May 4, 1967), and copies thereof are appended to this petition in the appendix at p. 23. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

I. Does the Federal Government occupy a position of absolute immunity under the Federal Tort Claims Act notwithstanding 18 U. S. C., Secs. 1503, 1507, as to protecting by investigation or otherwise, a federal juror's business from an unlawful conspiracy and boycott, which conspiracy and boycott were carried out on account of a fresh verdict rendered by said juror (Count I). (The conspiracy and boycott were not violations of any state statutes.)

II. If, under these facts, the Federal Government makes a minimal investigation, does there then devolve a duty to exercise due care in carrying out this investigation (Count II).

STATEMENT.

This is an action by Petitioner against Respondent under the Federal Tort Claims Act.

Petitioner was summoned as a federal juror and served on a controversial civil rights damage suit (Ware v. Johnson). As a result of a defendant's verdict, certain leaders of the Albany Movement, The Student Non-Violent Co-ordinating Committee, both militant and activest civil rights groups in Albany, Georgia, entered into an un-

lawful conspiracy on or about April 15, 1963, to picket, boycott and destroy Petitioner's grocery business in Albany. On April 20, 1963, the conspirators caused Petitioner's said grocery business to be picketed and boycotted with the avowed purpose of destroying same.

The unlawful conspiracy and said overt acts were entered into and done solely to intimidate a federal juror because of the verdict in the aforementioned case.

The said overt acts continued until April 29, 1963, at which time Petitioner was forced to close his business because the conspiracy had completely destroyed petitioner's business and source of livelihood.

Petitioner's grocery business was located near the Harlem commercial area of Albany, and its clientele was approximately ninety-eight (98) percent colored, and had been a going, prosperous concern for six and one-half (6½) years at this location.

Beginning on April 16, 1963, and through April 29, 1963, Petitioner and his attorney on many and numerous occasions called upon the U. S. Department of Justice and the Federal Bureau of Investigation at their Albany, Georgia, office, a Federal Agency under the Tort Claims Act, to investigate and prevent the said unlawful acts upon Petitioner. Petitioner and his attorney advised the F. B. I. before the boycott and picketing occurred and while it was occurring that the said organizations and their leaders had met and planned to wilfully destroy petitioner's business because of his said jury service.

Petitioner contends that the law enforcement agencies of the Respondent, under 18 U. S. C. 1503 and 1507,[1] owe a duty to protect a federal juror from such unlawful intimidation and duress, before, during and after his jury

[1] See Appendix at p. 24.

service. Said Agencies negligently and wrongfully failed to provide such protection to Petitioner.

Petitioner contends that the Department of Justice, of which the F. B. I. is a part, had it within their power to make an investigation, to make arrests on violation of 18 U. S. C., Sec. 1503 and Sec. 1507, and said action would have prevented the destruction of Petitioner's said business.

The U. S. Department of Justice, through the F. B. I., had thoroughly investigated the Ware v. Johnson case, knew that The Albany Movement and The Student Non-Violent Coordinating Committee were vitally interested in seeing that Ware received a verdict in said case. Further, that the said F. B. I. knew that both of said organizations were very militant civil rights organizations, and had been particularly active in the City of Albany, Georgia, with regard to business boycotts and business picketing, and thus could reasonably foresee the effect of a defendant's verdict in the case of Ware v. Johnson, on Petitioner.

The alleged acts of The Student Non-Violent Coordinating Committee and The Albany Movement were not violations of any criminal statutes of the State of Georgia, or Ordinances of the City of Albany, Georgia.

Petitioner further contended that as a direct and proximate result of the negligent and wrongful conduct of Respondent's agencies, Petitioner's business was destroyed, and thus Petitioner had been damaged $200,000.00.

By amendment, Petitioner denominated his complaint as Count I and added a second Count. The primary distinction between Count I and Count II, is that in the latter Count, Petitioner contended that after receiving the request on April 16, 1963, as mentioned in Paragraph 10, the F. B. I. did on April 16, 1963 and on April 17, 1963,

conduct an investigation for the sole purpose of determining whether or not attorney C. B. King of Albany, Georgia (who was attorney for Ware), was a participant at the unlawful conspiracy meeting, which was held on April 15, 1963, and planned to picket, boycott and destroy Petitioner's said business.

Petitioner further contended that the F. B. I. completed their investigation on or about April 17, 1963 and determined that said King was not a participate at said conspiracy meeting. This concluded the investigation by the F. B. I.

Petitioner further contended that notwithstanding the knowledge said F. B. I. and the Department of Justice acquired from the repeated requests from Petitioner and the minimal investigation mentioned above, said agencies stubbornly refused to investigate the known conspirators, make arrests and thereby prevent the destruction of Petitioner's said business.

Respondent filed a motion to dismiss, which was sustained without an opinion.

On appeal, the Court of Appeals affirmed.

The Court of Appeals enunciated a finespun distinction by concluding that the discretionary exemption should be determined on "the nature and quality of the discretion involved in the acts complained of."

Notwithstanding there was a clear violation of a federal statute, which was peculiar to petitioner, the Court embarked onto uncharted water in predicating its holding on the following propositions:

(a) "All must be aware now that there are times when the interests of the nation require that a prosecution be foregone."

(b) "The national wellbeing has been in the balance during the recent struggle for racial equality, of which the present action is a piece. The federal government's decisions concerning enforcement of its criminal statutes comprise a part of its pursuit of national policy."

(c) "The United States is immune from liability in the present case not because of the mere fact that government officials made choices, but because the choices made affected the **political** (not merely the monetary) interests of the nation. The Act is intended to spread monetary losses in certain cases among the taxpayers; it is not intended to affect the distribution of **political** responsibilities." (Emphasis supplied.)

REASONS FOR GRANTING WRIT.

The Court's decision has jeopardized the integrity of our Federal Judicial System, in that a federal juror is afforded absolutely no protection against reprisals because of his verdict, notwithstanding 18 U. S. C., Sec. 1503.

The decision should be reviewed because it erroneously interprets the Torts Claims Act so as to effectively dilute its overriding purpose.

The Circuit Court's decision has rewritten the Torts Claims Act to add **political interests** and/or **national policy** as exceptions to the Act.

The Court failed to apply the rule advanced in United States v. Muniz, 374 U. S. 150, 10 L. Ed. 2d 805, 83 S. Ct. 1850 (1963), which allows recovery under the Act for novel and unprecedented claims, even in the absence of state authority.

The Circuit Court has unduly narrowed and restricted the scope of the Act to cover claims arising out of discretionary acts of the government in spite of this Court's

decisions: Indian Towing Co. v. United States, 350 U. S. 61, 100 L. Ed. 48, 76 S. Ct. 122; and Rayonier, Inc. v. United States, 352 U. S. 315 (L. Ed. 2d 354, 77 S. Ct. 374).

The questions presented are of great and recurring significance in the administration of the Torts Claims Act. The serious questions of maintaining our jury verdicts inviolate and carrying out the avowed purposes of the Act, make this case a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction.

There can be no discretion involved to compel defendant to investigate or enforce a clear violation of its statute.

In the **Muniz Case**, supra, the Supreme Court in a unanimous opinion (Justice White took no part in case), allowed recovery to plaintiffs injured while they were inmates of federal penal institutions, one by negligence in the diagnosis and treatment of a benign brain tumor, and the other by negligently permitting an assault on him by 12 fellow inmates.

The Court in the **Muniz Case**, supra, overruled a group of lower court decisions which for many years had consistently held that federal prisoners cannot maintain suit under the Act for injuries sustained during their incarceration as a result of negligence of federal employees.

Significantly, too, the Court held in the **Muniz Case**, supra, that the claims of federal prisoners are actionable against the United States under the Tort Claims Act even though, under State laws, both the State and the jailer are immune from such suit.

The Court in short order disposed of the Government's discretionary defense for the reason that the Government's duty was fixed by 18 U. S. C., Sec. 4042. By the same token this Respondent's duty was fixed by 18

U. S. C., Sec. 1503. The complaint alleged a clear violation of 18 U. S. C., Sec. 1503, and further alleged that Respondent was given this information and had knowledge of same well in time prior to its occurrence and while it was occurring.

The construction that the federal tort act extends to novel and unprecedented forms of liability which was enunciated in the **Indian Towing Case**, supra, and the **Rayonier Case**, supra, was relied upon by the California Appellate Court in the case of **Morgan v. County of Yuba**, 41 Calif. Rptr. 508 (1964) wherein the Court held a county could be sued for the failure to give promised warning to decedent and her children immediately upon release on bail of one who had threatened the life of decedent. The Court said:

> "Whatever the policy of the law may or should be regarding the nature of the act performed when an officer makes a theretofore unpromised decision on the question whether or not he should warn a threatened victim of a prisoner's release, once the decision has been made and the premise has been given, the act of carrying out the policy is not discretionary in any sense."

When petitioner received his jury summons of April 1, 1963, the Respondent in effect covenants inter-alia with petitioner by saying: "As part of the consideration for your serving on a federal jury, the U. S. of America covenants to protect you and your property from intimidation by anyone as a result of any verdict assented to by you as provided in 18 U. S. C., Section 1503."

Plaintiff, a solid American citizen, readily and cheerfully assented to serve on a controversial civil rights case, notwithstanding the fact that 98% of his business was colored. Plaintiff fully discharged his duty. Notwithstanding the clear and plain responsibility of the govern-

ment under 18 U. S. C., Sec. 1503, the government, for reasons best known to them, chose to turn its back on plaintiff and wrongfully and totally failed to prevent the unlawful destruction. This the defendant failed to do in spite of repeated requests well in advance of the picketing and boycotting, and in spite of the breakdown of the integrity of defendant's federal judicial system. For plaintiff's government to make no pretense to come to plaintiff's rescue is unbelievable and incredible.

The respondent in instant case failed to perform the duty which was required of it and respondent had no choice in view of the code mandate.

If we assume for the sake of argument that the government's duty to investigate and make arrests in the case at bar, was discretionary, once the government does an overt act in making superficial investigation (as alleged in Count II) the question of discretion is of no moment, and thus cannot be relied upon by the government.

Our case is confined to an individual, who not only served on a federal case, but because of his verdict has been destroyed, which removed it from the usual argument that to require a government to absolutely protect all its citizens at all times would be an intolerable burden in our society. The **Muniz Case**, supra, has forever removed any "restrictive state rules of immunity."

The Congressional purpose of accomplishing a broad waiver of immunity from suit in tort, as reflected by adoption of the Tort Claims Act, is anything but irrelevant. Congress clearly contemplated the bill as a remedial enactment to alleviate the hardship and the inequity of the immunity doctrine. The discretionary function exclusion should, therefore, be narrowly applied, else its inherent vagueness and potentially long reach may preclude a remedy in situations where Congress anticipated that the claimant would be protected by judicial recourse.

To permit our government to turn its back on the claim of this citizen because of its political interest is rank discrimination in the rawest form.

CONCLUSION.

We earnestly submit that this case does not come within the ambit of any exception to the Act, and reason, logic, intrinsic justice and the maintenance of the integrity of the federal judicial system demand that this claim be actionable.

Respectfully submitted,

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Certificate of Service.

I hereby certify that on June 27, 1967, I served the foregoing petition for the petitioner by causing two copies each, thereof to be air mailed, postage prepaid, to: Messrs. David L. Rose and Robert C. McDearmid, Appellate Section, Civil Division, Room 3706, U. S. Department of Justice, Washington 25, D. C.; Solicitor General, Department of Justice, Washington 25, D. C.

P. Walter Jones,
Attorney for Petitioner.